

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-1497

UNITED STATES OF AMERICA,

Appellee,

-against-

MOSES WEINDLING and
PATRICIA JOANNE McINTYRE,

Docket No.
77-1497

Appellants.

On Appeal from the United States District
Court for the Southern District of New York

BRIEF IN BEHALF OF APPELLANT
WEINDLING

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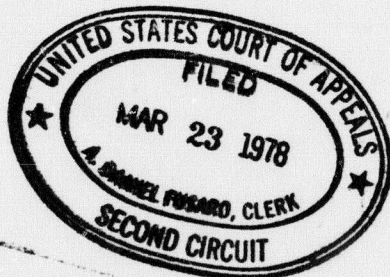


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PRELIMINARY STATEMENT

Appellant Weindling appeals from a Judgment of Conviction entered against him on December 9, 1977 after a Jury trial before Hon. Richard Owen in The United States District Court for The Southern District of New York.

Appellant and his co-appellant Patricia McIntyre were jointly indicted in a 4 count indictment charging one count of Conspiracy to violate The Narcotic Laws, and three counts of possession of Cocaine with intent to distribute same. Weindling was named in the Conspiracy Count and all 3 Substantive Counts. Each was convicted as charged.

On December 9, 1977 appellant Weindling was sentenced by Judge Owen to a prison term of 5 years which he is presently serving

FACTS

THE GOVERNMENT'S CASE

DETECTIVE ANTHONY MINICHELLO testified in substance that he is a detective in The New York City Police Department, and in April of 1977 he was assigned to the New York Drug Enforcement Administration Task Force (34-35)*

On April 27, 1977 he was working in an undercover capacity with an informant named Steve whose function was to introduce him to persons against whom evidence for a Narcotic case could be obtained (35-36).

That afternoon Steve introduced Minichiello to Weindling in the Sixish Restaurant in Manhattan, they had a conversation in which Appellant Weindling told Minichiello that he (Weindling) was dealing in a good product, Weindling gave Minichiello a small plastic bag with a small spoon, and suggested that he check it out (40-41).

Minichiello took the bag and spoon into the bathroom, stirred the contents of the bag with the spoon and went back to the table. Weindling asked how he liked the sample. Minichiello nodded in the affirmative (42).

Minichiello told appellant he was interested in buying 4 1/2 ounces. Appellant stated he could sell him 3 1/2 ounces (43). After further conversation, appellant told Minichiello he could keep the sample but not the spoon (45). They discussed price. Weindling said an eighth of a kilo would cost \$4,600 of \$4,700. Minichiello said it was too high (45-46).

*Numerals in parenthesis refer to pages of the trial transcript. When preceded by the letter A they refer to pages of the Appendix to this Brief.

A few minutes later Weindling left the table saying he had to call his lady. He returned and said patty would be passing by. Shortly afterward, Patty (Appellant McIntyre) came into the restaurant and joined them. There was further discussion regarding price. Finally it was agreed that the price of 3 1/2 ounces would be \$3,400 (47-48).

Shortly afterward, Minichiello left the restaurant and went to his office to process the sample. The undercover phone rang and Minichiello answered. Weindling was calling to say he could now sell 4 1/2 ounces of cocaine. They discussed price and agreed on \$4,500 dollars (50-51).

The following afternoon Minichiello and Steve met with both appellants at the Grass Restaurant in Manhattan (51). Weindling had an attache case (53). Minichiello asked Weindling if he had the packages, to which Weindling replied he only had 3 1/2 ounces. Minichiello asked to see the package. Weindling said neither he nor McIntyre had it but it was in the restaurant. Weindling gave Minichiello a sample of the package in a plastic bag. Weindling suggested that Minichiello check out the sample in the bathroom. Minichiello said he preferred to check out the package. Weindling said it would inconvenience Ms McIntyre if he provided the package at that time. Weindling stated that he guaranteed that the quality of the sample was the same as the package. Ms. McIntyre stated that they had tried the package the night before and it was so good it dissolved the skin near her nose (54-56).

After further conversation during lunch, Weindling said something to Ms. McIntyre who then went to the rear of the restaurant and descended the stairway. Weindling stated she would come back with the package. As Ms. McIntyre was returning to the table thereafter, he commented that she looked good with \$4,500 worth of cocaine on her. Ms. McIntyre then gave her handbag to Weindling who opened it and passed it to Minichiello under the table (61-62).

Minichiello looked inside the handbag and saw a white unsealed business type envelope inside of which was a brown paper bag. He opened it. Inside were three plastic bags of different sizes. Their contents appeared to be of the same substance as the sample Weindling gave him earlier(63-64). Minichiello then stated that he would go to get the money. Weindling told him to take the bag with him. Minichiello declined and left the restaurant, simultaneously giving a pre-arranged signal. A pre-arranged signal to other officers in the restaurant who then arrested appellants and Steve and Minichiello (65-66).

The alleged narcotics package was never thereafter seized or found by the officers (108).

On cross-examination Minichiello acknowledged that his handwritten notes had been destroyed (79-80) and that he did not record his conversations with appellant on any recording device (81) or attempt to get a search warrant for Weindling's home. (93).

With respect to the missing 3 1/2 ounces of cocaine, he admitted that if he had taken the package from Weindling it would have been enough for an arrest. (104).

On re-direct examination, Minichiello testified (over objection) to various commendations he had received for bravery (130-134) discussed under a later point heading on this brief.

INVESTIGATOR HANSEN testified in substance that he was a member of the New York City Police Department assigned to the New York Drug Enforcement Task Force (151).

On April 28, Hansen was engaged in a surveillance inside the Grass Restaurant (152). He observed Detectives DeRosa and Mahone in the place (153). He also saw Minichiello seated with the informant and both appellants (154). At about 4:35 p.m. he saw McIntyre go downstairs toward the restrooms (155). Shortly thereafter a brunette from another table got up and walked down the stairs behind her. Ten minutes later McIntyre came up and returned to the table. The brunette did not come back up (156).

When Minichiello was leaving the restaurant, McIntyre went back downstairs. Hansen went down and observed her on the phone. He placed her under arrest (157). Detective DeRosa took her pocketbook (158).

On cross-examination Hansen stated that he had searched the restaurant after the arrest but could not find any drugs.

On re-direct examination, Hansen stated that his search of the restaurant took place about 45 minutes to an hour after the arrests. He first learned that the 3 1/2 ounces was missing after he left the restaurant and returned to 57th Street (197).

DETECTIVE JOHN DEROSA testified, in substance that he was a detective in The New York City Police Department, assigned to the Drug Enforcement Task Force (207).

On April 28, 1977 he was on surveillance at the Grass Restaurant (207), along with other detectives (208). At about 2:35 p.m. he observed appellants seated at a table with Minichiello & the informant (213). Just prior to that a woman seated at a table near him also went downstairs. About 3 minutes later the woman returned and sat down at her table. A younger female who was also at that table then got up & went downstairs (214). McIntyre was still downstairs (215).

Three or four minutes later McIntyre returned to the table at which she was sitting with Weindling, Minichiello and the informant. Weindling passed her purse to Minichiello, who looked down at something towards his legs and then got up and began to walk toward the front door of the restaurant (216). At this point he saw McIntyre going downstairs again. The older woman at the other table was still there. The younger woman was not (215-216).

DeRosa then observed Minichiello remove his jacket which was the signal that he had seen the cocaine (216). DeRosa then approached Weindling and placed him under arrest (217). A few minutes later he observed Hansen bringing Ms. McIntyre up from the stairway. DeRosa went over and looked into her pocketbook. All he saw in there were some papers and lipstick. He returned the purse to her (218).

Later he returned and interviewed the employees and searched the restaurant (219).

On cross-examination he testified that he did not know who the two women at the other table were. He did not see either of them speak to either appellant. There were also other people in the restaurant eating and drinking. Other than observing the women going up or down the stairway he did not see anything else they did (229).

On re-direct examination he testified (over objection, and motion for mistrial made at sidebar, 243, 251, 252) that he observed Ms. McIntyre carrying a handbag to court that morning which was similar to the one he examined after arresting her in the Grass Restaurant (270-271).

He further testified over objection, 271, 277) that during the past week he had begun an investigation into the identity of the brown haired woman who followed McIntyre downstairs in the Grass Restaurant (271). He stated that he had "some knowledge" to lead him to "believe" who the young brunette was (277). When asked by the Court what his "State of knowledge was", he replied, "I have an idea of who it might be" (278). He went on to state that the woman whom he believed was the woman in the restaurant was named Patricia Thomas and was an Eastern Airlines flight attendant - as was Ms. McIntyre - and was a close friend of hers who had resided with her at one time (278-279).

When asked on re-cross examination of Ms. Thomas was a black person, he replied that he would not definitely say so but

she did not appear to him to be a black person (282). On further re-direct he said he was 85% sure Ms. Thomas was the woman in the restaurant. On further re-cross he said he had some doubt at present (283).

CHARLES J. RINALDO testified in substance he was employed by the New York City Police Department assigned to the New York Drug Enforcement Task Force (284).

He testified generally to observing appellants and Minichiello and the informant talking together at a table in the Sixish Restaurant on April 27th (286-288).

Rinaldi further testified that on the following day, April 28 he was engaged in surveillance of the Grass Restaurant while in a parked car on the street. He observed appellants enter the restaurant at about 2:40 p.m. and some two hours later observed Minichiello leave the restaurant and return. Shortly thereafter Detective Daly put Weindling into Rinaldi's car in handcuffs (288-289). Weindling was upset saying he didn't know what was going on but was willing to cooperate, Rinaldi told him to be quiet and he would reread his rights and could cooperate thereafter (289-290).

A few minutes later appellant McIntyre was put into the car by Agent Panessa who read both appellants their rights (290). No statements were made (292). On the way to the precinct he heard Weindling say to McIntyre that they were in trouble and she was consoling him (293). Weindling asked her if they had the pocketbook and she said not to worry, there was nothing in the pocketbook (293-294). Later when they reached the stationhouse Rinaldi said to Weindling the office didn't have the cocaine. Weindling said he left it on the table in the restaurant (294-295).

Rinaldi and other officers went back to the restaurant, to search but failed to locate the cocaine (295).

On cross-examination Rinaldi stated that he made notes of the events but they were destroyed after being typed by a secretary (309).

FRED SANDLER testified that he was a Special Agent employed by The Drug Enforcement Administration. He testified that on April 28th he received Weindling's brief case from DeRosa (320). He opened it with a screwdriver (321). Inside was a strainer used to mix narcotics and a cylinder used for snorting cocaine (322-323). He also saw several plastic bags, minala bags and other objects (324). He testified that the plastic bags and the brown bags could be used to contain cocaine, the strainer for mixing narcotics, the straw to snort cocaine, and the cylindrical objects to store cocaine (329).

Sandler further stated that he interviewed Weindling in his (Sandler's) office and read Weindling his rights, after which they had a discussion (330-333). Weindling said he met with Tony in on the 27th and 28th and on both days had given him a sample (340). Weindling further stated he had acquired the cocaine from a cuban on the west side of New York named Jose to whom he owed \$2,800 for it (341). Sandler asked him where the cocaine was and Weindling said it was on the table during his arrest. Sandler was also present when Weindling was interviewed by an Assistant U.S. Attorney who informed him of his rights. Weindling gave him his home phone number (341-342).

On cross-examination Sandier stated that electronic recording devices were used in the case but no recordings of either appellant were obtained (347). Sandler was not present when Weindling was given his rights when placed in the Government vehicle after his arrest (350-351). Recordings of telephone conversations between Weindling and the informant were made but did not come out (362). Sandler in his report erroneously set forth that McIntyre had blue eyes, when in fact they were brown (375).

JOHN P. SAWINSKI testified in substance that he was a forensic chemist who analyzed narcotics for the Government (381-382). He conducted chemical tests on the Exhibits given him and found them to be cocaine and other materials (384-390).

On cross-examination he said that merely feeling a white powder would not be sufficient to establish it as cocaine. It would be necessary to conduct a chemical analysis (394).

SANDRA ANN JERONIMO testified in substance that she was a waitress at the Grass Restaurant. On the day McIntyre was arrested she saw her in the ladies room talking to a woman with brunette hair (406-407). The brunette said to appellant "that's the best I can do for you" or "that's the best advice I can give you" (409-410).

On cross-examination she stated she just spoke to the U.S. Attorney a week and a half ago and spoke to DeRosa a few days before speaking to Ms. Cote (415-416).

Following the testimony of this witness the Government rested (442) Motions to dismiss were denied (445,446).

THE APPELLANTS' CASE

PATRICIA McINTYRE, testified in her own behalf in substance as follows:

She was 22 years old (453-454) and worked for Eastern Airlines as a stewardess (455). She came to New York when Eastern Airlines sent her here in September, 1976 (455). She moved in with another stewardess, Pat Thomas. She met appellant Weindling the second day she lived in New York. She lived with him for about three months. She now lives with her sister (456-457). She frequently saw Weindling use cocaine, and tried it herself but did not use it regularly (458).

On April 27th she was no longer living with Weindling but still seeing him (458). She was taking her bicycle to a gas station near the Sixish Restaurant when Weindling came out and asked her to join him, which she did. Inside she saw Steven and was introduced to tony (459). She knew Steven through Moses (460). She heard no talk about drugs (460).

The next day she and Moses met Minichiello and Steven for lunch at the Grass Restaurant (465). After lunch she went to the ladies room (468). There were two other women there. She did not know them (469). She might have had a conversation with someone but doesn't remember (470). She came back upstairs and returned to the table; Moses asked her for her purse (471). She was holding his money (472). She saw no cocaine in the purse, and did not see Weindling give the purse to Minichiello (473). She never told Minichiello about trying some cocaine the night before (475). She never discussed with Weindling any plan to sell

cocaine, nor did she see any in either restaurant on the 27th or 28th. She did not see Pat Thomas in the Grass Restaruant or anyone else she knew (476). She never heard Moses offer to sell cocaine (479).

On cross-examination by Weindling's counsel she said that after meeting Weindling she came to know that he was a user of cocaine (479). She tried to get him to stop using it (481).

On cross-examination by the Government she stated that while in the police car after their arrest, Weindling asked her where her pocketbook was and she said "they have it" He asked if there was anything in it and she replied in the negative (518).

Ms. McIntyre was shown a triple beam scale and was asked if she ever saw one like it in Weindling's apartment. She denied it (551-552). A motion for mistrial was denied (551). She stated that Weindling had no scale except a small postage scale in his apartment (552). The Government offered the triple beam scale into evidence. A defense objection was sustained (553). She recalled getting Moses money from the agents after the arrest but believed it to be \$200.00 (575-576).

On re-direct examination, Ms. McIntyre stated that Pat Thomas was black and in person appeared darker than her photograph in evidence (598-599).

Appellant Weindling did not testify.

GOVERNMENT'S REBUTTAL

Agent Sandler was recalled. He testified that on the day of the arrest he took custody of \$892.50 seized from Weindling and turned it over to Ms. McIntyre (601-602). He has no receipt from Ms. McIntyre for the money (603).

Both sides now rested. Motions to dismiss were denied (623-627).

POINT ONE

THE TRIAL COURT
COMMITTED PREJUDICIAL
ERROR WITH REGARD TO
THE PROSECUTION'S
RE-DIRECT EXAMINATION
OF ITS WITNESS.

The prosecution's key witness, Detective Minichiello, was the only witness called by the Government who testified to the transaction involving the alleged possession and sale of the cocaine to him by appellants. Thus, his credibility was crucial to the Government's case. Apparently recognizing this, the prosecution conducted the following re-direct examination of Detective Minichello over objection by defense counsel (130-131; A-2a A-3):

"Q Have you lived in New York all of your life?

A Yes, I have.

Q Do you have family in New York?

MR. ANOLIK: Objection, your Honor, irrelevant and immaterial.

THE COURT: I will allow it because I assume that the Assistant has some idea of relevance here. I will allow it at this point.

Overruled.

Q Do you have family in New York?

A Yes, I do. I have parents, sisters and a brother and a child living in New York City.

Q How old is that child?

A Eleven years.

Q How old were you when you became a police officer?

A I was 21 years old.

Q How long was it before you became a detective?

A I was promoted to detective in 1969.

Q So you had been on the force how many years?

A Fourteen years.

Q Have you ever received any awards and commendations for bravery and excellence in service during the time --

MR. ANOLIK: I have an objection.

THE COURT: I will overrule the objection.

Q Excellence in the form of duty during the time you have been a police officer?

A Yes.

Q Briefly describe what those awards and commendations have been.

A I received the Walter Scott medal for valor from Mayor Lindsay in 1968, for a shootout with a subject who had held up three liquor stores and shot another police officer.

MR. JOY: I object to that. It's inflammatory.

THE COURT: Overruled.

A I received a letter of commendation from Louis J. Lefkowitz.

THE COURT: Come up to the side bar."

At side bar the Court took the position, as did the prosecution, that the defense had suggested to the jury that Detective Minichiello had perjured himself in order to enhance his reputation in the police force and this type of re-direct examination served

to counter such an implication by showing he had a good reputation which he would not want to destroy by making a false accusation (131-132; A-3 A-4). Accordingly, the Court permitted the line of re-direct examination to continue as follows (133-135 A-5 A-7):

" Q I believe you were about to describe a citation you received from Attorney General Lefkowitz. Describe that for the jury.

A I received a letter of commendation from Attorney General Lefkowitz regarding the incident I described earlier. That was a shootout with a suspect who had held up three liquor stores and shot another policeman. In addition, I received an award from the American Legion. I received eight excellent police duty awards that ranged from apprehending rape suspects armed with weapons, guns, knives, burglary suspects --

MR. ANOLIK: To preserve the record, we want to move for a mistrial at this time.

MR. JOY: I join in that.

THE COURT: Motion denied.

A A burglary suspect that attempted to hit me with a hammer. I received a meritorious police duty award for that incident.

Most recently I received an award from Mayor Beame for my work regarding the Son of Sam investigation.

Q You were assigned during the Son of Sam investigation to the New York Drug Enforcement Task Force?

A Yes. But I was sent over to the Queens Homicide Task Force to work on the Son of Sam investigation two and a half months prior to its conclusion.

Q I believe you described awards and citations.

Did you receive any other commendations during your service as a police officer?

A I received a commendation that involved the disarmament of a young man who had pointed a gun at me and another police officer.

Q Have you ever been injured in the line of duty?

A Yes, I have.

Q On how many occasions?

A I have been thrown from the boardwalk in Coney Island. I was kicked in the groin. I was thrown down a flight of stairs. Approximately four different times I have been injured in the line of duty.

Q You have told us three. Do you remember the fourth?

A The other one was a sprain to my left hand. Grappling with a robbery suspect.

Q Detective Minichiello, have you ever received or do you know if it's customary for police officers to receive promotions for lying under oath in court?

MR. ANOLIK: I object to that. That's for the jury to determine.

THE COURT: I will sustain that objection. Not on the ground you urge, however.

MR. ANOLIK: I understand, your Honor."

All of the foregoing testimony of Minichiello was apparently permitted by the Court as a form of retribution for the following relatively bland questions put to Minichiello on cross-examination (73-74; A-1 A-2):

"Q What grade detective are you?

A Third grade detective.

Q Are there any grades above third grade?

A Yes, there are.

Q What determines, if you could tell us., promotion in the detective squad in New York City?

A At the present time?

Q At that time in April

A Nothing

Q Nothing?

A There has not been grades in the detective division for three years and the only grade that was given out was recently with respect to the Son of Sam incident. That was the only grade that was made.

Q Everybody else is third grade?

A There has been a freeze insofar as advancement within the detective division for the past three years.

Q But in the Son of Sam case there were grades made?

A That's correct.

Q If you make a particularly good arrest or collar, there is always the hope you will be recognized, isn't that true?

A At the present time no, it's not. Something like the Son of Sam case, the sensationalism of it, being a political year, there were grades given out, yes.

Q But if you don't perform in the detective squad you might be transferred back to uniform, isn't that true?

A Yes, that's true.

Q It would be fair to say that they expect a detective to perform, isn't that true?

A That's true."

It is respectfully urged that the error below was not in recognizing the right of attack by the defense upon the credibility of Minichiello, but in permitting improper re-direct examination by the use of questions which did not address themselves to such credibility. Recitations of alleged bravery in the line of duty, and commendations therefor, do not give rise to an inference of credibility. While the prosecution might have been entitled to attempt to counter the inference of Minichiello's incredibility, the error here was in the means chosen and permitted. Demonstrating Minichiello's officially recognized expertise in coping with violence served only to unfairly popularize him with the jury for reasons not probative of the issue of his credibility. The Court below abused its discretion in permitting the quoted testimony of Minichiello thus elicited on re-direct examination. Defense counsel, on cross-examination, did not

open a door to the type of re-direct testimony elicited here,
(Compare, U.S. v. Lubrano, 529 F 2d 633, 637 [2d Cir., 1975]; U.
S. v. Tramunti, 513 F 2d 1087, 1118 [2 Cir., 1975])).

POINT TWO

THE TRIAL COURT ERRED
IN PERMITTING THE PROSECUTION
TO INTRODUCE SPECULATIVE
TESTIMONY AS TO THE IDENTITY
OF A POSSIBLE ADDITIONAL
PARTICIPANT IN THE CRIMES
CHARGED.

Among the witnesses called by the Government was John DeRosa, a detective in the New York City Police Department (207). On April 28th, 1977, at about 2:00 P.M., he was in the Grass Restaurant as part of a surveillance team (207). At about 2:35 P.M. he observed appellants and Detective Minichiello and the informant seated at a table in the restaurant (210-213).

At about 4:30 P.M. he observed appellant McIntyre leave the table and go down a flight of stairs to the basement of the restaurant. About a minute prior to that a woman seated at a nearby table with another, younger, woman also went downstairs. Three or four minutes later this woman came back to the table and the younger woman thereupon went downstairs. Appellant McIntyre was still downstairs (213-215).

A few minutes later appellant McIntyre returned and sat again at the table with Minichiello, the informant, and appellant Weindling. DeRosa then observed Weindling hand McIntyre's purse to Minichiello, who appeared to look into it (215). Minichiello then got up and walked toward the front door of the restaurant. At that time DeRosa also observed appellant McIntyre going down

the stairs again. He also noticed that of the two women at the other table, the older one was still seated there, but not the younger woman (216).

Pursuant to a signal from Minichiello, DeRosa and another officer placed Weindling under arrest (216-217). DeRosa then saw Investigator Hansen bringing up Ms. McIntyre from the stairway. DeRosa took Ms. McIntyre's handbag and looked inside. All that was inside were some papers and lipstick (218). According to the Government's theory, the handbag when shown to Minichiello had a quantity of cocaine in it, but was now missing and never found thereafter.

On cross-examination, defense counsel questioned DeRosa with respect to the two women at the other table (228-229); A-8 A-9

"Q You say you saw two women at this table here which you designate A and A, is that right?

A Yes.

Q You didn't know who those women were, did you?

A At the time, no.

Q At any time?

A No

Q Do you know now who they are?

A No, sir."

On re-direct examination the following appears in the record (276-278; A-10 A-12).

" THE COURT: I think the record should show the question is one of Mr. Anolik asking about his knowledge of these people. In accordance with our side bar conference this opens the door to the Government's inquiry.

JOHN DeROSA resumed.

THE COURT: The entry into this area of inquiry should come from what is his state of knowledge about these people and not from whether he conducted an investigation last week. That may be the subject of further cross-examination. Let's await the event.

MS. COTE: The Government wants to develop through this witness he began to investigate who exactly the brunette was just during this past week. It does not imply that at the time of the arrests any investigation was undertaken.

THE COURT: I will permit that to a limited degree only to establish the time.

MS. COTE: Very brief, your Honor.

(In open court: jury present.)

BY MS. COTE:

Q Do you recall being asked on cross-examination whether or not you knew who the young brown-haired -- by the way that's like brunette -- woman was who followed Ms. McIntyre downstairs at Grass Restaurant was?

MR. ANOLIK: I object to the characterization. The word "followed" I object to.

THE COURT: In subsequent time she went downstairs.

MR. JOY: No objection to that.

A Yes.

Q Were you instructed during this last week to conduct an investigation relative to the identity of that brunette woman?

MR. ANOLIK: I object.

MR. JOY: I object.

THE COURT: Overruled.

A Yes.

Q Do you have an idea as to who that woman might be?

MR. ANOLIK: Objection to "idea".

THE COURT: I will sustain it. What is your knowledge if any with regard to that woman?

Q Do you now have some knowledge that would lead you to believe who may be the young brunette woman?

MR. ANOLIK: I object to that.

MR. JOY: I object.

THE COURT: What is your state of knowledge as to that person?

THE WITNESS: I have an idea of who it might be.

MR. JOY: I ask that that be stricken as not responsive.

THE COURT: I will overrule that.

Q Have you uncovered the identity of a particular person whom you believe may be the brunette?

A Yes, I have" (underlining ours)

The witness went on to testify that the name of the person whom he believed to be the brunette was Patricia Thomas, a close friend of appellant McIntyre, who had at one time resided with her (278-279; A-12 A-13).

DeRosa's re-direct testimony was elicited to support the Government's theory -- unproven in the record -- that the missing cocaine was given to the brunette in the bathroom by appellant McIntyre just before her arrest. McIntyre denied seeing Pat Thomas in the restaurant (476; A-14) and no other evidence was offered by the prosecution to justify the introduction of this type of speculative TV drama evidence. Its prejudicial effect upon appellant was magnified by its use by the prosecutor in summation (743; A-57) as discussed in another Point in this brief.

The admission of such speculative testimony was error. See, U. S. v. Borelli, 336 F. 2d 376, (2 Cir. 1964); Robertson v. U. S., 171 F. 2d 345 (D.C. 1948); U. S. v. Gallo, 123 F. 2d 229 (2 Cir. 1941).

POINT THREE

THE EVIDENCE WAS INSUFFICIENT
IN LAW TO ESTABLISH THAT THE
ALLEGEDLY MISSING POWDER WAS
COCAINE AS ALLEGED IN THE FOURTH
COUNT OF THE INDICTMENT

Appellants were jointly charged, in the fourth count of the indictment, with possessing 3 1/2 ounces of cocaine on January 28, 1977, with intent to distribute same.

The Government's evidence as to this count revolved around events in The Grass Restaurant on that day. Detective Minichiello testified, in essence, that he there met with both appellants and the informant on the afternoon of January 28th (51). Weindling told him that he had 3 1/2 ounces but not in his or Ms. McIntyre's immediate possession. Weindling then offered to show a sample, and removed a small plastic bag from his boot which he gavt to Minichiello (54). Weindling said the sample came from the 3 1/2 ounce package. Ms. McIntyre stated that she had tried some from the package the night before. (56).

A little later on, about 4:30 p.m., Ms. McIntyre left the table and went downstairs. Weindling said "she will be back with the package." (61-62) At Ms. McIntyre was returning he commented, "Doesn't she look good with \$4,500 worth of cocaine on her." Ms. McIntyre gave her handbag to Weindling who opened it and passed it to Minichiello under the table (62).

Minichiello looked inside the handbag and saw a white unsealed business type envelope, inside of which was a brown paper bag. Minichiello opened it and inside were three plastic bags of different sizes (63-64). The contents were of the same substance as

Weindling had given him earlier (64). Minichiello then stated that he would go for the money. Weindling told him to take the bag with him. Minichiello declined and left the restaurant, giving a pre-arranged signal to other officers for the arrest of appellants. The appellants were arrested along with Minichiello and Steve (65-66).

The alleged narcotics package was never thereafter seized or found by the police (108).

The applicable rule of law in such situations is found in U.S. v. Agueci, 310 F. 2d 817 (2 Cir. 1962), Cert. den. sub nom Guippone v. U.S. 83 S. Ct. 1013 372 U.S. 959, 10 L. Ed. 2d 11:

"It is not necessary, in order for the Government to prove its case of conspiracy to violate the narcotic laws, that there be proof of actual dealings in narcotics. All that need be proved is the unlawful agreement and an overt act committed in pursuance of the agreement. The 'conspiracy is a crime and of itself, separate and apart from the crime of importation, purchase, sale, and transportation of narcotics.' Poliafirc v. United States, 237 F. 2d 97, 105 (6th Cir., 1956), cert. denied, 352 U.S. 1025, 17 S. Ct. 590, 1 L. Ed. 23 (1942); Pereira v. United States, 327 U.S. 1, 11, 74 S. Ct. 368, 98 L. Ed. (1954). The rule is otherwise, however, with regard to substantive violations of the narcotics law; there, the jury must be convinced beyond a reasonable doubt that the substance imported sold, concealed, or adulterated was in fact a narcotic drug. This element, under the terms of 21 U.S.C. § 174, is requisite to a conviction. But it is not necessary that it be proved by direct evidence. Just as with any other component of the crime, the existence of and dealing with narcotics may be proved by circumstantial evidence; there need be no sample placed before the jury, nor need

there be testimony by qualified chemists as long as the evidence furnished ground for inferring that the material in question was narcotics. See United States v. Morello, 250 F. 2d 631, 633-634 (2d Cir., 1957)."

At bar, the Government produced no direct evidence as to whether the substance in the unrecovered package was cocaine. In terms of circumstantial evidence as to its content, there was only the alleged statement of Weindling that it was cocaine. The argument that the alleged samples contained cocaine and therefore so did the larger package should not be a substitute for evidence in so serious a charge.

In this regard it should not be overlooked that Detective Minichiello, according to his own testimony, was offered possession of the package and rejected it. Thus, the Government by the conduct of its own witness precluded itself from objectively proving what the package in fact contained. In sum, the evidence was not sufficient to establish circumstantially beyond a reasonable doubt that the uncovered package contained cocaine.

POINT FOUR

THE PROSECUTION'S CROSS-
EXAMINATION OF APPELLANT McINTYRE
AS TO WHETHER A TRIPLE BEAM SCALE
HAD BEEN IN APPELLANT WEINDLING'S
APARTMENT WAS INFLAMMATORY AND
PREJUDICIAL

Appellant McIntyre testified in her own behalf. During cross-examination she was asked 551-552, (A 15 -A-16):

"Q. Wasn't that setting right on a table in Mr. Weindling's apartment at York Avenue?

A. I was there once.

Q. That apartment only had a bedroom and one other room, the living-room, right?

A. Yes, and a kitchen.

Q. A small kitchen. And that was right in the living-room, wasn't it?

A. I can't say -- I would not even remember. I was honestly only there once.

Q. Do you know what a triple beam scale is used for?

MR. ANOLIK: I move for a mistrial.

THE COURT: The motion is denied.

You may answer

A. No.

Q. Have you ever seen anything like this triple beam scale either at that apartment on York Avenue or anywhere else?

A. I didn't even take science. I have not seen one --

THE COURT: The question is whether you have ever seen a scale like this.

THE WITNESS: Maybe in high school.

Q. Mr. Weindling didn't have any scale like this in the apartment that he lived in when you were with him, right?

A. No

Q. In fact he didn't have any scale, right?

A. That's right. When we lived together?

Q. When you lived together.

A. That's right

Q. No scale at all?

A. No. Just one that he put -- it is a small kitchen thing that you put for postage. It's a postage scale.

After some additional questions concerning the postal scale, the Government offered the scale in evidence. An objection by Weindling's counsel was sustained (553).

The damage to appellant Weindling was already done, however, When the the prosecutor asked her "whether that [scale] wasn't setting right on a table in Mr. Weindling's apartment at York Avenue" The jury could not help but infer that the prosecutor had gotten it from appellant's Weindling's apartment irrespective of whether she had seen it herself. Else why ask the question? In reality she was being used as a convenient means of inferring evidence against her co-defendant who did not take the stand.

At the very least, the Court should have instructed the jury at that point that the question was not evidence as to where the scale had been. Since no such instruction was given, the Jury

relying on the inference from the Government's question very likely took it as fact that the scale had been in Weindling's apartment. The Government's cross-examination of McIntyre on this point was unfairly prejudicial to Weindling.

A new trial should be ordered.

POINT FIVE

THE PROSECUTOR'S DIRECT
SUMMATION AND REBUTTAL
SUMMATION WERE INFLAMMATORY
AND IMPROPER.

The prosecutor had two opportunities to sum up to the jury. On each occasion the summation was replete with arguments ranging far beyond the outer limits of fairness. We deal herein with each such situation in order of occurrence.

A - THE DIRECT SUMMATION

(1) At page 652 (A-32) the following occurred with reference to a conversation recited by Detective Minichiello between him and appellant Weindling:

"Then, when they tried to find out Detective Minichello's operation, he pointed to his briefcase and told Detective Minichello he had strainers to help cut the coke. That's dealers' language.

MR. ANOLIK: I object to that, your Honor.

THE COURT: Overruled.

MISS COTE: That's dealer's language for diluting cocaine."

The comment "That's dealer's language " was the prosecutor's own interpretation as to what the conversation signified in terms of Weindling's alleged statement. There is nothing in the record wherein any expert testified that such otherwise ordinary

words constitute "dealer's language." The plain -- and prejudicial-- import of this remark was that the Government was arguing (from facts not in the record) that appellant must have had so many other narcotics transactions that he even knew the esoteric language and used it.

As noted by this Court in U. S. v. Spangelet, 258 F.2d 338 (2 Cir. 1958) at p. 342:

"It is well settled that the jury's consideration in a case should be limited to those matters actually brought out in evidence and that summation should not be used to put before the jury facts not actually presented in evidence."

See, also, U. S. v. Lefkowitz, 284 F. 2d 310 (2 Cir., 1960); U. S. v. Pepe, 247 F. 2d 838 (2 Cir. 1957).

(2) At pages 656-657 (A-36 A-37) the prosecutor stated with respect to whether or not the 3-1/2 ounces of "missing powder" was in fact illicit cocaine.

"How do we know that the three and a half ounces charged in that fourth count are, in fact, cocaine: His Honor will charge you that you don't have to be a chemist. You could look at a variety of factors to make a judgment as to whether or not it was, indeed, cocaine. After all, you have the defendant's own word for it. You have the price that was to be paid for it.

MR. ANOLIK: I object, again, your Honor. I object to that last statement. I think it is very -- I objected at the beginning of the trial.

THE COURT: I think Miss Cote is referring to the testimony of Detective Minichello, what he was told about the contents.

MR. ANOLIK: I am not sure.

THE COURT: I assume that's it?

MISS COTE: Yes, your Honor.
I will rephrase it to make it clearer.

THE COURT: Proceed."

Since the defendant did not take the stand, any direct reference by the Government on his failure to do so is unconstitutional and reversible error. This principle of constitutional law is equally true when the reference "indirectly invites the jury's attention to the accused's failure to take the stand." (U. S. ex rel. D'Ambrosio v. Fay, 349 F. 2d 957, 961, [2 Cir. 1965]). Judge Anderson there stated:

"It is true, however, that ambiguous language, which indirectly invites the jury's attention to the accused's failure to take the stand, will, if not cured by prompt instructions, be grounds for setting aside a subsequent conviction. Coleman v. Denno, 223 F. Supp. 938 (S.D.N.Y. 1963), aff'd sub nom. United States ex rel. Coleman v. Denno, 330 F. 2d 441 (2d Cir.), cert. denied 377 U.S. 1003, 84 S. Ct. 1938, 12 L. Ed.2d 1052(1964); see Desmond v. United States, 345 F. 2d 225 (1st Cir. 1965)"

The reference to "defendant's own word for it" was an inevitable and forceful reminder to the jury that the defendant did not take the stand.

Nor was this the first such occurrence. At the very outset of the trial, during the Government's opening, the prosecutor assured the jury that "you will hear from the defendant's own lips" (27; A-78). A defense motion for a mistrial was denied (28; A-79).

Thus, at the outset, the jury's attention was improperly focused upon whether or not defendant would take the stand, and at the conclusion it was made plain to the jury that he had not.

This approach to a prosecution has no place in our criminal justice system. As so aptly observed by Mr. Justice Douglas in Griffin v. State of California, 380 U. S. 609, 614, 85 S. Ct. 1229, 1234:

"For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice'"

(3) At pages 664-665 A-44 A-45), the following appears:

" What is the defense to all of this evidence? Here is something that is a little bit difficult for me to talk to you about. The defendants want you to believe that Detective Minichello got on that stand and perjured himself right in front of you. They want you to believe that he jeopardized his career in the Police Department, a career in which he has been decorated almost too many times to remember in order to make a case against these two people whom he didn't even know. I submit to you that there can only be one

reaction to such an argument and that is outrage. Without one shred of evidence -- and I ask you to look at the evidence in this case -- without one shred of evidence, they want you to believe that a detective working in a department where there has not been a promotion in the last three years, who has been cited by the Mayor for his valor, who risks his life --

MR. ANOLIK: I object to this whole thing, your Honor. It has nothing to do with his credibility.

THE COURT: Overruled.

MISS COTE: He has risked his life on countless occasions for the people of this City, a man whose family and child live in this City, a family and child who are proud of this man every day --

MR. ANOLIK: I move for a mistrial. This has nothing to do with this case.

THE COURT: Overruled.
Let us proceed.

MISS COTE: They want you to believe that such a man is willing to throw all of that away by taking that witness stand and lying to you.

If you believe that, if you believe Detective Minichello was lying to you, then I say to you that the Government does not even want you to leave the jury box and go to deliberate: acquit these two people immediately, if you believe that."

We note firstly that the admissibility of the testimony upon which this argument in summation was predicated has already been discussed, infra. If we are correct in our basic contention that these references to the police officer's alleged bravery are not properly probative of his credibility, then the summation is

clearly prejudicial and inflammatory.

Even if the officer's original testimony as to his bravery were to some extent admissible, it does not justify the overly dramatic appeal to the jury's expected bias in favor of a "hero cop" as a predicate for converting allegations of valor into the higher quality of credibility. See, e.g. U. S. v. D'Alesandro, 361 F. 2d 694 (2 Cir., 1966).

THE REBUTTAL SUMMATION

(4) We have herein previously urged as reversible error the Government's introduction into evidence of the "belief" of Detective De Rosa that the brunette observed by a waitress speaking to appellant McIntyre in the bathroom of the Grass Restaurant was one Patricia Thomas, a stewardess for Eastern Airlines, who was known to both appellants. Although De Rosa admitted on cross-examination that he did not previously or presently know who the woman was who so spoke to appellant McIntyre (228-229; A-8 A-9) he was allowed to testify over objection on re-direct examination that he had "an idea" of who the brunette young woman might be (276-278; A-10 A-12), and that he uncovered the identity of a person whom he "believed may be the brunette", which brunette was Patricia Thomas (278-279; A-12 A-13).

It was against this setting that the following occurred during the Government's rebuttal summation (743; A-57).

"Was this just any other brunette? Is this just a coincidence that the brunette in Grass Restaurant was a former room-mate of Miss McIntyre, someone who knows both the defendants, who was a stewardess for Eastern Airlines?

MR. JOY: I object, your Honor. There is no testimony that she was in the restaurant at all.

THE COURT: I think the record will support that argument.

MISS COTE: I believe, if you remember, Detective DeRosa was asked how sure was he that the brunette he saw in Grass Restaurant on the 28th was Patricia Thomas, and if you remember he said he was 95 percent sure.

So what is Patricia Thomas doing in this case? The Government didn't bring her to Grass Restaurant on the 28th; the defendants did that.

MR. ANOLIK: Objection. There is no evidence to support that at all.

THE COURT: Overruled."

Here again, the Government urged upon the jury two critical "facts" which were actually not in the record, viz, that the brunette in the restaurant was appellant's friend Patricia Thomas and that it was not the Government but rather, appellants who brought her to the restaurant (743, 745; A-57, A-59).

Thus, the Government, using facts not in the record, created a third participant in the crime charged to enable the Government to proffer to the jury a theory upon which the missing 3-1/2 ounces of cocaine could be accounted for. To put it another way, the Government wished to argue that DeRosa "believed" the

brunette woman who spoke to appellant McIntyre was in the restaurant (not proven); that she was Pat Thomas (not proven); that since Pat Thomas knew appellants, she therefore took possession of and hid the missing 3-1/2 ounces of cocaine (not proven).

We respectfully submit that the foregoing is a classic illustration of the vice in arguing from facts not in the record. The prejudice to appellant is self-evident. (U. S. v. Spangelet, supra; U. S. v. Lefkowitz, supra; U. S. v. Pepe, supra.)

(5) While still arguing the unproven allegation that appellants brought Miss Thomas to the Grass Restaurant, the prosecutor made the following further comment (745-746; A-59 A-60)

"No, it was no accident that Miss Thomas was in that restaurant. She was not asked by a friend to drop by while she was driving her bike along. She was there to help. We didn't bring her to that restaurant; the defendants did.

What is a response to all of this? They explain, because we only learned about it a week before trial -- well, isn't it better that we finally solved that portion of this crime even if it is on the eve of trial? It is because we did solve that portion --

MR. ANOLIK: I object to that. She is putting her own credibility in issue, and that's improper. She was not there.

THE COURT: Argue it perhaps differently, Miss Cote.

MISS COTE: It is because we did solve that portion of the crime that the defendants have brought --

THE COURT: I take it the Government urges that it has solved that portion of the crime within the last week, right?

Proceed."

The Government compounded the error by now, placing its own integrity and credibility into issue. Moreover, in telling the jury that "we finally solved that portion of this crime," the prosecutor made herself an unsworn witness vouching for her own hearsay allegations. A judgment of conviction obtain under these circumstances cannot be permitted to stand.

As stated in U. S. v. Spangelet, supra, at 258 F. 2d 342, 343:

"And it is especially inadmissible for the prosecutor to put into issue his own professional integrity as was done here. See dissenting opinion in Henderson v. United States, 6 Cir., 218 F. 2d 14, 22. In United States v. Pepe, 2 Cir., 247 F. 2d 838, we held it improper for the prosecuting attorney himself to take the stand to impeach the testimony of a witness. We think the prosecutor's conduct here was equally improper; in effect, he gave testimony as to a fact allegedly within his personal knowledge without taking an oath or subjecting himself to cross-examination, People v. Lovello, 1956, 1 N.Y. 2d 436, 154 N.Y.S. 2d 8, 136 N.E. 2d 483."

See also, Berger v. U. S., 295 U. S. 78, 55 S. Ct. 629.

(6) In replying to an argument raised by defense counsel as to what appellant Weindling meant when he allegedly asked appellant McIntyre about her purse after their arrest, the prosecutor

asked the jury (750; A-64):

"By the way, is there any evidence in this case that any complaint was made by anyone about the agents stealing \$900? This is a tremendous red herring; this is another way to smear the character --

MR. ANOLIK: I don't think the Government can argue on lack of evidence.

THE COURT: Overruled.

MR. ANOLIK: I ask for a mistrial.

THE COURT: Overruled. Motion denied.

MISS COTE: That is another way to smear the character of the agents in this case without any evidence at all."

In so arguing, the prosecutor was, in effect alluding to appellant's failure to testify and failure to produce evidence. Both comments are improper. (U. S. ex rel. D'Ambrosio v. Fay, supra; Griffin v. State of California, 380 U. S. 609, 85 S. Ct. 1229).

(7) Lastly, there occurred the following at pages 762-763 (A-76 A-77) during the Government's summation:

"In conclusion, Mr. Anolik has mentioned to you that this case is a milestone in the lives of these two people. I'm not denying that. I'm not denying the seriousness of the charges against them.

But don't be misled by those comments of his because whether these two people, if you should find them guilty, get probation or a suspended sentence --

MR. ANOLIK: Your Honor, I object to that. They face fifteen years here.

THE COURT: I will charge the jury that sentence is a matter not of their province; it is a matter of the Court's province should there be any finding.

Go ahead without further reference to that subject."

This impropriety of the prosecutor's remarks is apparent. It resulted in informing the jury (incorrectly) that even if the jury convicted appellants, they would be the recipients of merciful treatment in the form of probation or a suspended sentence. By so stating, the prosecutor diverted the jurors from their true function in the case, thereby prejudicing appellants.

POINT SIX

APPELLANT WEINDLING
ADOPTS ALL ARGUMENTS
RAISED BY APPELLANT
McINTYRE IN HER BRIEF
INSOFAR AS SAME ARE AP-
PLICABLE TO HIM

CONCLUSION

THE INDICTMENT SHOULD
BE DISMISSED OR, IN THE
ALTERNATIVE, A NEW TRIAL
SHOULD BE ORDERED

Respectfully submitted,

WILLIAM SONENSHINE,
Attorney for Appellant Weindling
and

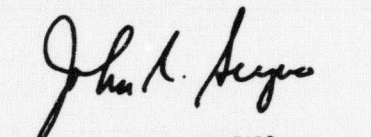
EUGENE MASTROPIERI
Attorney for Appellant Weindling

AFFIDAVIT / SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF KINGS) ss.:
)

Marie Ratner, being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at Brooklyn, New York. That on the 22nd day of March, 1978 deponent served the within brief on behalf of appellant upon Hyman Bravin, Esq. 6 E. 45th St. N.Y. N.Y. atty. for appellant McIntyre, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post paid pr operly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York

Sworn to before me this
22nd day of March, 1978



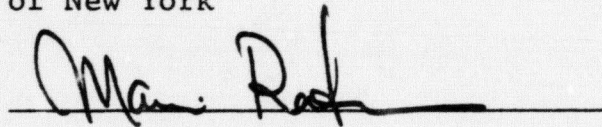
JOHN R. SERPICO
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No. 24-3598170 - Qualified in Kings Co.
Commission Expires March 30, 1979

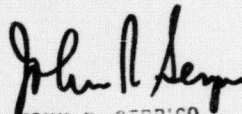
AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

Marie Ratner, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Brooklyn, New York. That on the 21st day of March, 1978 deponent served the within brief on behalf of appellant (2) copies thereof upon Hon. Robert B. Fiske, Jr., U.S. Attorney, Southern District of New York in this location at 1 St. Andrews Plaza, New York, New York, the address designated by said attorney for that purpose by depositing 2 true copies of same enclosed in a post paid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York

Sworn to before me this
22nd day of March, 1978




JOHN R. GERICO
Notary Public, State of New York
No. 24-3598170 - Qualified in Kings Co.
Commission Expires March 30, 1979